85-930

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1985

No. .....

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,
Petitioners,

– against –

MASTERS, MATES & PILOTS PENSION PLAN, et al.,
Respondents.

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) When a licensed deck officer accepts competitive employment on ocean-going vessels under a different union's contract to extricate himself from a "Hobson's choice" of low paying and degrading assignments that his former union and employers deliberately created, to force him and others similarly situated to retire in the interest of obtaining "new young blood", should the pension plan that they jointly sponsor be required to pay him the full economic value of the pension benefit he would have received without regard to such other employment?

(2) Should summary judgment dismissing the antitrust cause of action have been denied?

(3) When the denial, reduction and suspension of benefits under a multi-employer pension plan have been found to be a "harsh penalty" that is both discriminatory and "arbitrary and capricious", and the District Court's findings establish that the participant's change in employment was the outgrowth of what was tantamount to an involuntary constructive discharge, is the conditioning of the remedy afforded upon his permanent withdrawal from competitive employment inequitable, or in contravention of the policy undergirding the Age Discrimination in Employment Act as well as the antitrust laws and ERISA, and should payment of the full economic value of the pension benefit to which he would have been entitled in the absence of such other employment, together with interest, be required?

(4) When the deletion of an age 65 requirement as a pre-condition for pension benefits is part of the bargaining history of the labor agreement, is the reintroduction of such a requirement by pension plan trustees, without such a change having been made in the labor agreement itself, void and *ultra vires* as being both an alteration of vested rights and contrary to the requirement that pension plan trustees as fiduciaries must discharge their duties for the exclusive purpose of providing benefits to participants in accordance with the documents and instruments governing the plan?

LIST OF PARTIES TO PROCEEDING BELOW

ARTHUR CHAMBLESS and MILDRED H. CHAMBLESS,

Plaintiffs-Appellees, Cross-Appellants,

-v-

MASTERS, MATES & PILOTS PENSION PLAN, STEPHEN P. MAHER, Administrator of the Masters, Mates & Pilots Pension Plan, C.J. BRACCO, RICHARD M. CASSELBERRY, MICHAEL DI PRISCO, E. GRAS, GEORGE GROH, JUSTIN GROSS, JAMES R. HAMMER, JAMES J. HAYES, MARTIN F. HICKEY, CHARLES JESS, FRANCIS E. KYSER, CHARLES LANDRY, ORION A. LARSON, ROBERT J. LOWEN, LLOYD MARTIN, J. ERIC MAY, DAVID MERRITT, THOMAS E. MURPHY, HENRI L. NEREAUX, WILLIAM OTT, MARTIN PECIL, FRANKLIN J. RILEY, JR., WILLIAM I. RISTINE, A.C. SCOTT, CAPT. JOHN SMITH, RUPERT SORIANO, ERNEST SWANSON, MICHAEN SWAYNE, ALLEN TAYLOR, NICHOLAS TELESMANIC, KENNETH P. WENTHEN, C.E. WHITCOMB, in their fiduciary capacity as Trustees of the Masters, Mates & Pilots Pensions Plan,

Defendants-Appellants, Cross-Appellees,

AMERADA HESS CORPORATION, AMOCO SHIPPING COMPANY, CENTRAL GULF LINES, INC., AMERICAN MARITIME ASSOCIATION, NATIONAL TRANSPORT CORP., WABASH TRANSPORT, INC., MARITIME SERVICES COMMITTEE, INC., INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Defendants, Cross-Appellees.

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Respondents.

A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Arthur Chambless and Mildred H. Chambless petition for a writ of certiorari to review a judgment of the above-entitled case by the United States Court of Appeals for the Second Circuit entered on August 28, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported as *Chambless v. Masters, Mates & Pilots Pension Plan, et al.*, 772 F.2d 1032 (2d Cir. 1985), and is set forth in the Appendix at pages with the prefix "A." The decision of the United States District Court for the Southern District of New York is reported at 602 F. Supp. 904 (S.D.N.Y. 1984), and is set forth in the Appendix at pages with the prefix "B." An unreported Endorsement Order of the United States District Court of the Southern District of New York dated November 30, 1984 is set forth in the Appendix at pages with the prefix "C." An earlier decision of the United States District Court for the Southern District of New York granting in part defendants' motion for summary judgment is reported at 571 F. Supp. 1430 (S.D.N.Y. 1983), and is set forth in the Appendix at pages with the prefix "D."

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1985 (A-1). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Employment Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § § 1002(22), 1002(24), 1053(a), 1104(a), 1105, 1132(a) & (f), 1140, the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a), the Sherman Antitrust Act, 15 U.S.C. § 1, and the Clayton Antitrust Act, 15 U.S.C. § 15. The foregoing provisions are set forth in the Appendix at pages with the prefix "F."

STATEMENT OF THE CASE

This case involves Captain Arthur Chambless who has spent his life at sea in the United States Merchant Marine, working his way up from seaman to "Master" or Captain, the highest officer in command of huge, sea-going tanker vessels, and his wife, Mildred H. Chambless. The basis for federal jurisdiction in the court of first instance is ERISA (29 U.S.C. § § 1132(a) and 1140), the Clayton Antitrust Act (15 U.S.C. § 15), and the Labor-Management Relations Act of 1947 (29 U.S.C. § 185(a)).

Captain Chambless sailed for over 33 years as a member of the International Organization of Masters, Mates & Pilots (the "union" or "M.M.&P."). On April 2, 1977, he filed an application for retirement benefits with the M.M.&P. Pension Plan (A-6).* The pension plan is an M.M.&P.-sponsored multi-employer plan covering a portion of the employers sailing U.S. flag ships in ocean-going commerce. It provides for specified benefits which the employers are required to finance under the collective bargaining agreement by making annual contributions in amounts determined by the pension plan's actuary.

On June 30, 1977, the pension plan informed Captain Chambless that his benefit under the pension application that he had filed would be $920 per month, payable beginning as of May 1, 1977 (A-6).

Later, when Captain Chambless informed the pension plan that he had been sailing in competitive employment under another labor contract, in reliance upon advice given him by a union agent, he was told that his pension benefit would be suspended for ten years, until he reached age 65 (even if he stopped sailing immediately), and then reduced to a monthly benefit of only $470 per month (A-6-7).

The District Court held that the suspension and reduction in benefits were both discriminatory and "arbitrary and capricious."

The findings of the District Court that set forth the underlying punitive motive for the action by the pension plan are as follows (B-10-12):

> "In 1976, the union launched a plan to pressure older licensed deck officers to retire. Chambless, who between 1966 and 1975 had regularly received assignments as chief mate or master, was told either to retire or to accept only the lowest grade assignment – second or third mate. Indeed, his only assignments from MM&P hiring halls during 1976 and 1979 were second and third mate jobs.
>
> * * * *
>
> "The union cannot adopt a policy of forcing applicants to retire or face low paying assignments if they refuse to do so and yet prohibit or penalize them from working apart from MM&P in jobs matching the skills and experience they have acquired. This is another reason why the penalty imposed on Chambless for accep-

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* Citations with letter prefixes are to pages in the Appendix.

ting employment as a master on ships operated by companies not under contract to MM&P is capricious.

"A retiree who works in forbidden employment but not as a licensed deck officer on a U.S. flag ocean going vessel operated by a company not under contract to MM&P forfeits his pension for the time he is working and for six months thereafter. One, however, who works as a licensed deck officer on a U.S. vessel under the jurisdiction of a rival union forfeits his pension until age 65. This regulation does not conform to ERISA requirements.

* * * * *

"The union wanted to keep younger licensed deck officers content with their MM&P affiliation. Therefore they pressured the older officers to retire with these provisions. Given the wage related formula for computing pension benefits, the threat to assign older officers lower paying second and third mate jobs was tantamount to a threat to reduce their pensions. Thus they had to choose between retiring and securing a greater pension benefit or continuing to work faced with both a loss of pay and status and also a reduced pension. *Amendment 47 was intended to prevent older officers from escaping this Hobson's choice by taking non-MM&P jobs.*

"While the trustees may clearly impose regulations requiring full retirement before they are obligated to award pension benefits, *they cannot extract the harsh penalty they imposed on Chambless in this case*. The regulation pursuant to which the penalty was imposed is not in the interest of the plan participants or their beneficiaries and is not necessary to maintain the financial integrity of the fund. Accordingly, the action of the trustees was arbitrary and capricious." (Emphasis added.)

However, the District Court did not fix the precise amount of damages. In response to plaintiffs' Fed.R.Civ.P. 59(e) motion, the District Court declined to do so, stating (C-1-2):

"Under the court's judgment, Captain Chambless is entitled to receive in 1985 the wage related benefits he would have been entitled to receive in 1977. If 1977 pensioners similarly situated to Captain Chambless have received cost of living increments which increase their monthly benefits beyond the 1977 level, it may well be that Captain Chambless might be entitled to a monthly stipend with

cost of living increments to bring him on par with other 1977 pensioners. It will be time enough to study that issue, if necessary, on remand. *My opinion did not contemplate pension benefits for Captain Chambless retroactive to 1977. Mr. Garfield's approach was not considered.* If this matter is appealed, plaintiff would be advised to raise those questions on appeal. Indeed, it would probably be prudent on plaintiff's part to cross-appeal, since a notice of appeal has been filed by defendant, in order to be certain that this matter is considered by the Court of Appeals. The issue of the cost of living increments does not appear to the court to necessitate a cross-appeal, but, again, prudence would dictate that the matter be presented to the court in brief and argument upon appeal." (Emphasis added.)

On appeal by the pension plan, the Court of Appeals affirmed the determination that the application of the pension plan regulation in question to Captain Chambless was arbitrary and capricious and therefore a "nullity" (A-15). However, the Court of Appeals also affirmed the decision of the District Court on the cross-appeal on behalf of plaintiffs wherein it was contended *inter alia* that the pension benefit to Captain Chambless should be adjusted to reflect the differing values of a benefit beginning in 1977, as opposed to eight or more years thereafter, or granted retroactively, and dismissing the antitrust claim.

A class action against the same pension plan pending in the United States District Court for the Middle District of Florida, Tampa Division, involves a companion amendment to the pension plan (Amendment 46) adopted in August 1976, when the amendment here involved (Amendment 47) was adopted. *Deak v. Masters, Mates and Pilots Pension Plan, No. 79-190* (M.D. Fla. June 4, 1984). Captain Chambless was permitted by court order to withdraw from the class represented in the *Deak* case because of the differing issues involved, including the antitrust count in this action.

The District Court's decision in the *Deak* case is set forth in the Appendix at pages with the prefix "G." In that case, the District Court found the pension plan's trustees to have breached their fiduciary duties. (G-11) This was based upon a finding that the trustees had penalized pensioners in order to discourage them from seeking employment elsewhere in the industry in a job which benefited a competing union. (G-11) However, the benefit suspension invalidated in *Deak* was less

harsh than the punitive action taken against Captain Chambless because it did not also involve a drastic reduction in the amount of the monthly benefit. The *Deak* case remains pending in the District Court in Florida.

I. THE TRUE ECONOMIC VALUE OF THE SAME MONTHLY BENEFIT NOT PAYABLE UNTIL EIGHT YEARS LATER IS SUBSTANTIALLY REDUCED.

Captain Arthur Chambless is in the paradoxical situation of having won his case of abusive behavior on the part of a pension plan, only to find that the judgment he won apparently will yield a pension having true economic value that is substantially less than that which he originally would have received, had he bowed to defendants' unlawful dictates. This is a result of the refusal of the courts below to recognize the true economic value of the monthly benefit at the time it is payable.

The life expectancy of Captain Chambless when the pension commences will be eight years less then it was in 1977. Therefore, a pension in the amount of $920 per month for life beginning now does not have the same economic value as a monthly benefit of the same amount beginning in 1977.

At the trial of the case, an expert witness, Dr. Ralph Garfield, testified that the difference in value of the $920 per month pension that Captain Chambless indisputably could have received as of May 1, 1977, and the $470 per month pension benefit that the pension plan proposed to pay him more than eight years later (and then, only if he survived), was $151,820 ($196,122 - $44,302). (E-6-7) No contrary evidence was offered on behalf of the pension plan.

The District Court concluded that the action of the pension plan trustees was a nullity because it "confiscated a considerable part" of the pension benefit of Captain Chambless. (B-9) Yet, under the District Court's judgment, that confiscation, although reduced in amount, still continues.

The plan should either have been required to provide retroactive benefits to Captain Chambless or to enhance the value of the benefit to correspond to what it would have been in 1977. It did neither.

The net result is that, notwithstanding execrable behavior found to be discriminatory as well as arbitrary and capricious, the defendants are allowed to retain a very real financial advantage. Dr. Garfield tes-

tified that $112,607 represented the value (with interest) of what the pension plan otherwise would have had to pay out to Captain Chambless in the intervening period while his rights were being litigated. (E-7) If that amount is not paid over to Captain Chambless, it will reduce by like amount the contributions that the employers otherwise will be required to make to the pension plan. Simple equity requires that funds retained by a pension plan while a participant's rights are being successfully litigated should be paid to the participant in order to avoid unjust enrichment of the defendants whose behavior in breach of their fiduciary duties made the litigation necessary. See generally Niles, "A Contemporary View of Liability for Breach of Trust," 29 *Record of the Association of the Bar of the City of New York* 573 (1974) (Hess Memorial Lecture).

The judgment entered by the District Court did not specify the precise amount of the monthly benefit to be paid, but only said the trustees are to "treat the application, for the purpose of calculating his wage related pension, as if it had been made in 1977, thereby granting him a wage-related pension based on his 1967-1977 employment record" (B-14). Accordingly, plaintiffs moved under Fed.R.Civ.P. 59(e) to alter or amend the judgment so as to provide such specificity as to the amount of the monthly benefit in order to avoid further controversy. (E-7)

The affidavit of Dr. Garfield submitted in support of the motion stated that a pension beginning January 1, 1985, would need to be in the amount of $2,730 per month in order to have a value equivalent to a $920 per month pension beginning May 1, 1977, based upon the life expectancy of Captain Chambless.

The response of the District Court was to avoid the issue in its judgment, and only to advise that the matter be taken up with the Court of Appeals on a cross-appeal since the pension plan already had indicated a desire to appeal its determination.

However, on the cross-appeal, the Court of Appeals merely said that Chambless was not entitled to receive retroactive benefits because of his employment on competitive vessels (A-20-21), thus effectively repudiating the decision that such a limitation was unlawfully "capricious" in the circumstances of this case. (B-10, quoted *supra* at pp. 3-4.)

Thus the issue that the District Court said that it had not considered, and passed on to the Court of Appeals, in response to plaintiffs' Rule 59(e) motion, *i.e.*, the approach and remedy set forth in the testimony and affidavit of Dr. Garfield (C-1, 2), was buried by the latter without comment, notwithstanding the fact that the District Court had already found the very suspension for competitive employment provisions that the Court of Appeals relied upon to be impermissibly discriminatory in their application to Captain Chambless (B-10):

> "The discrimination that the plan practices against retirees and applicants for retirement, barring participation in any maritime employment while allowing others to continue working in the maritime industries and permitting some retirees, pursuant to the 1981 collective bargaining agreement, to accept, after three years, employment on vessels engaged in offshore drilling, exploration and research, or on vessels ancillary to such operations, and permitting short time employment on vessels engaged in trial runs or being delivered, provided union approval is received and plan trustees notified, does not seem in the abstract so egregious as to come within the arbitrary or capricious prohibition. *Nonetheless, the bar became arbitrary and capricious in its application to Chambless.*" (Emphasis added.)

The inconsistency between the District Court's finding of unlawful discrimination under the plan's competitive employment prohibitions, and the use of those same provisions as a purported justification for denying a retroactive pension to Captain Chambless, is compounded by the recognition by both courts that "no forfeiture of benefits can be exacted from an employee for attempting to improve his position by accepting work with a competitor of his employer." (A-14)

If the testimony and affidavit of Dr. Garfield do not set forth circumstances of a forfeiture of a very substantial kind, the word has lost its meaning. When the purpose and effect of what the defendants have done, as the District Court found, are to have "confiscated a substantial part" of the pension benefits of Captain Chambless (B-9), the pension plan cannot equitably be permitted to retain the economic benefit from the funds that it held in its control while he has had to litigate his rights. It is unfair to penalize Captain Chambless because he did not give up his competitive employment, on which his family was dependent, while his case wound its way through the courts. No

reasonable person would have recommended that he risk putting himself in a position in which he could be bereft of both pension and employment during the time that he was forced to seek a judicial remedy.

The advantage derived from the retention of funds during litigation undoubtedly explains why the pension plan has never exhibited even the slightest interest in settling this case, even after it lost in the *Deak* case. The added burden that such an advantage places upon the judicial system by discouraging settlements is a further reason why its continuation should not be countenanced.

The District Court's decision, which was affirmed, emphatically condemned as "carpricious" the imposition of a penalty on Captain Chambless for accepting competitive employment under a different union's contract. (B-10)

Yet when the "bottom line" of dollars and cents is reached in the judgment, a capricious result is precisely what happened. In terms of this union's pension plan: a penalty has been imposed in the form of awarding a monthly pension benefit that is only nominally the same as what Captain Chambless admittedly could have received in 1977, but has a true economic value that is much less.

Even before ERISA, with its remedial purpose, the law of New York, where the pension plan maintained its offices, precluded the enforcement of a forteiture-for-competition clause when it was the conduct of the employer that led to the termination of employment. In *Post v. Merrill Lynch*, 48 N.Y.2d 84, 89 (1979), the New York Court of Appeals stated:

> *"An employer should not be permitted to use offensively an anti-competition clause coupled with a forfeiture provision to economically cripple a former employee and simultaneously deny other potential employers his services.*
>
> Under the circumstances of the case at bar it would be unconscionable to tolerate a forfeiture, precipitated as it is by the unwarranted action of the employer. We find, therefore, that in the case of an involuntary discharge, the rule stated in *Kristt* v. *Whelan* (4 AD2d 195, affd 5 NY2nd 807, *supra*) does not apply. Further we hold, that where an employee is involuntarily discharged by his employer without cause and thereafter enters into competition with his former employer, and where the employer, based on such competition,

would forfeit the pension benefits earned by his former employee, such a forfeiture is unreasonable as a matter of law and cannot stand." (Emphasis added.)

At the very least, the findings of the District Court involving the Hobson's choice imposed upon older employees, in order to force them to retire, were tantamount to an unlawful constructive discharge.

In a case of first impression, the Ninth Circuit has held that a constructive discharge situation may result in a forfeiture of benefits for which a remedy is available under Section 510 of ERISA (29 U.S.C. §1140), even though the provisions of the plan could have been validly applied in the case of a voluntary termination. *Lojek v. Thomas*, 716 F.2d 675, 680 (9th Cir. 1983).

For the Court below to have read ERISA to permit the kind of a forfeiture that is both inconsistent with the Ninth Circuit's decision, and would not have been countenanced before its enactment, represents an anomaly that merits the attention of this Court.

II. WHETHER ERISA ELIMINATED ANTITRUST REMEDIES WARRANTS REVIEW

The prejudicial effect of the District Court's previously having dismissed the antitrust count on defendants' summary judgment motion became readily apparent at the trial of this case.

In his testimony, the president of the union admitted that the restrictive pension plan amendments were a direct outgrowth of the defendants' intention to thwart competition by the use of monopoly power. What the defendants had, Mr. Lowen said, ". . .was almost a monopoly and I say that in the labor sense of the word, a labor monopoly, and we looked at insuring that whatever we did in the plan, we wanted to make it unattractive for anyone to go anywhere's else. . . ." (I-2)

Lowen candidly admitted that the purpose of the restraints was to block competition from new entrants operating new vessels having more advanced technology and greater productivity than those operated by the older, longer-established companies that had contracted with the MM&P. (I-1). He stated, "Those two amendments were to insure that, one, we kept—we as the plan and our part of the industry kept available to us the officers that any new company out there needed to operate a ship." (I-2)

It will not be news to this Court that, through just such restraints, the United States Merchant Marine, once at the cutting edge of competition and the envy of the world, has been brought down to its present lowly state.

Indicative of the importance of review by this Court of the antitrust issue in an employment situation are the conflicting and contrasting discussions in recent law review notes on the subject. See Note, *Employee Standing Under Section 4 of the Clayton Act*, 81 Mich. L. Rev. 1846 (1983); Note, *Antitrust Injury and Standing: A Question of Legal Cause*, 67 Minn. L. Rev. 1011 (1983); Note, *Antitrust Standing of Terminated Employees*, 25 Wm. & Mary L. Rev. 341 (1983).

Since 1926, masters of ships have had an antitrust cause of action for restraints of trade that limit or reduce their compensation from employment under *Anderson v. Shipowners Ass'n of the West Coast*, 272 U.S. 359 (1926).

On the cross-appeal below, following the District Court's improper grant of summary judgment on the antitrust issue, see *Poller v. CBS*, 368 U.S. 464, 473 (1962), ERISA was relied upon to insulate the defendants from antitrust liability. The Court of Appeals stated (A-19-20):

> "To the extent that the claim is based on diminished retirement benefits, it is essentially an ERISA matter. See *Lourie Visual Aid Tools, Inc. v. Chesebrough-Ponds*, 473 F. Supp. 951, 960 (S.D.N.Y. 1979). We therefore hold that Chambless has not shown the requisite antitrust injury."

There is nothing either in ERISA or in the legislative history pertinent to ERISA that supports the conclusion that it was intended to repeal by implication available antitrust remedies.

On the contrary, ERISA was intended to add to remedies, not to detract from them. See *Duchow v. New York State Teamsters Conference and Retirement Fund*, 691 F.2d 74 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1902 (1983).

As this Court has stated repeatedly, "[r]epeal of the antitrust laws by implication is not favored and not casually to be allowed" and is to be implied "[o]nly where there is a 'plain repugnancy between the antitrust and regulatory provisions.'" *Gordon v. New York Stock Ex-*

change, 422 U.S. 659, 682 (1975), quoting *United States v. Philadelphia National Bank*, 374 U.S. 321, 350–51 (1963).

Captain Chambless is one of a group of supervisory employees represented by the union in this case, so the so-called labor exemption from the antitrust laws is not applicable. Further, in *United Mine Workers v. Pennington*, 381 U.S. 657, 665–66 (1965), it is emphasized that "One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes party to the conspiracy."

Moreover, it has long been recognized that such activities as those here involved, designed to thwart competition in the maritime field, constitute antitrust violations. See *Commerce Tankers Corp. v. National Maritime Union*, 553 F.2d 793 (2d Cir. 1977).

The propensity of the M.M.&P. to engage in illegal and coercive activities in order to block competition is well established. See *International Organization of Masters, Mates & Pilots v. NLRB*, 575 F.2d 896 (D.C. Cir. 1978), involving the MOUNT EXPLORER, a ship on which Captain Chambless served.

Even the Impartial Umpire of the AFL-CIO condemned the coercive tactics of the union here involved as violations of Sections 2 and 3 of the AFL-CIO Constitution. *Between International Longshoremen's Association and National Marine Engineers Beneficial Association*, Determination re S/S MOUNT EXPLORER, Case No. 75108 (April 21, 1976).

The Circuit Court's allowance of an ERISA exemption for antitrust claims finds support in no other Circuit and is completely at odds with this Court's decision in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982), which emphasizes that anti-competitive activities by a labor union and employers are not insulated from antitrust scrutiny simply because they may be the outgrowth of collective bargaining or a pension situation.

The antitrust damage calculation made on behalf of Captain Chambless is no mystery, contrary to the Court of Appeals' statement that "Chambless has not made clear exactly what his antitrust injury is." (A–19) The antitrust injury suffered by Captain Chambless is set forth specifically in plaintiffs' responses to defendants' interrogatories dated March 2, 1982. It includes (1) elements of reduced earnings of

$43,470 because of employment in junior positions foisted off on him by the union and shipping companies, as a part of their "fresh young blood" program to force the older employees to take lower paying positions or retire, and (2) reduced pension benefit estimated at $150,000, making a total of $193,470, to be trebled. (H-1-2).

The Court of Appeals also erred in stating that to the extent the antitrust claim "is based on a limiting of employment opportunities, [Captain Chambless] can claim no direct injury in light of his successful continued employment on non-MM&P vessels." (A-19)

Not only is the claim broader than that, as stated above, but the ruling also is directly inconsistent with *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 436 (5th Cir. Feb. 20, 1985): "It is clear. . .that an antitrust plaintiff's post-violation successes do not necessarily preclude compensation for damages proximately caused by an antitrust violation." As pointed out in the Fifth Circuit's opinion, what is required is a factual analysis that cannot be decided, as it was improperly below, on a summary judgment motion.

The Court of Appeals cited *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), in support of its antitrust injury statement (A-19). However, the *Brunswick* case has not been thought to overrule *Radovich v. National Football League*, 352 U.S. 445 (1957).

The "business or property" of a ship's master working out of hiring halls, like Captain Chambless, rather than exclusively for a single employer, is more like the "business or property" of professional sports figures, for whom antitrust remedies are available. *See* Note, "Employee Standing Under Section 4 of the Clayton Act," 81 Mich. L. Rev. 1846 (1983). See also *Tugboat, Inc. v. Mobile Towing Co.*, 534 F.2d 1172, 1176 (5th Cir. 1976) ("There can be little doubt that an employee that is deprived of a work opportunity has been injured in his 'commercial interests or enterprise,' because the selling of one's labor is a commercial interest.").

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 483-84 (1982), this Court emphasized that an anti-competitive scheme offering a "Hobson's choice" to its victims as a means of foreclosing competition or restraining trade constitutes antitrust injury. The existence of a "Hobson's choice" in the instant case is made clear by the findings of the District Court, as is the anti-competitive purpose of forcing older

licensed deck officers to retire and at the same time penalizing them if they work in competition with the ships operated by the employers here involved. (B-11).

Although the District Court found that Captain Chambless was or should have been aware of the possible consequences of taking forbidden competitive employment (B-9), he was found not to be aware of the full extent of the harsh consequences thereby entailed (B-9, B-12). Moreover, such knowledge did not impute any consent by him to the illegal Hobson's choice rammed down his throat, in any event, and would not constitute a defense to the antitrust cause of action. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

Massachusetts Mutual Life Insurance Company v. Russell, ____ U.S. ____, 53 U.S.L.W. 4938 (1985), considered the narrow question of damages available for violations of Section 409(a) of ERISA. The Court expressly noted that (unlike the case at bar), the respondent therein had expressly disclaimed any reliance upon the equitable remedies provision of Section 502(a)(3). (53 U.S.L.W. 4940, at fn. 5.)

Thus, the *Massachusetts Mutual* case does not address the issue of the rights of Captain Chambless to an antitrust remedy; but this Court's grant of *certiorari* therein is indicative of the continuing importance of the question of remedies available in lawsuits that also embody ERISA claims. This also applies to the discussion of plaintiffs' remedies under Section 510 of ERISA, 29 U.S.C. § 1140, *infra* in Point III.

Review of the antitrust issue presented by this petition is particularly important on grounds of public policy. The *Deak* case decided in the United States District Court for the Middle District of Florida does not include an antitrust cause of action. However, the anti-competitive motive for the actions of the same pension plan trustees that the District Court there found to violate their fiduciary duties is made clear in the Court's opinion. (G-11-13) Therefore, unless review of the antitrust issue tendered by this petition is granted, the important public policy considerations that need to be addressed in the interest of effective antitrust enforcement will escape attention.

III. EQUITABLE REMEDIES UNDER ERISA SHOULD PROVIDE A FULL REMEDY FOR THE INJURY, AND NOT ONE THAT IS CONTRARY TO OTHER STATUTORY PURPOSES.

After declaring the action forfeiting his pension until age 65 to be "a nullity," the District Court conditioned the relief granted to Captain Chambless upon his permanently ceasing to work in the maritime industry within six months of the effective date of the judgment (B-13).*

Although the District Court did not discuss its reasons for imposing such a condition, the Court of Appeals found it to be "reasonable" on the ground that Captain Chambless was deemed to have had knowledge of the terms of certain of the pension plan regulations (A-21). However, this misses the point of *why* Captain Chambless was forced to seek other maritime employment, and the involuntary nature of his action. See *Lojek v. Thomas*, 716 F.2d 675 (9th Cir. 1983), discussed *supra*.

Normally, of course, the form of equitable relief ordered by a District Court is subject to review only for an abuse of discretion.

In this case, however, the six-month condition imposed by the District Court produces a result that is diametrically opposed to public policy. We have already discussed the violations of ERISA and the antitrust laws that such a condition entails. Further, by conditioning the ability of Captain Chambless to obtain the pension to which he is found to be entitled upon an election to give up his career within six months, the decision of the District Court fosters age discrimination.

The purpose of the Age Discrimination in Employment Act (29 U.S.C. § 621 *et seq.*) is to protect the right to older workers to remain employed. Forced retirement schemes below age 70 are clearly contrary to that policy. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 725 (2d Cir. 1984).

The six-month condition imposed by the District Court and affirmed by the Court of Appeals has just that forbidden effect.

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* A stay of the mandate of the Court of Appeals that has the effect of staying this provision through November 26, 1985, or until final disposition of a petition for a writ of certiorari, was granted by the Court of Appeals on September 30, 1985, pursuant to a motion on behalf of petitioners.

It also has the effect of reinforcing, rather than abating and remedying, the discriminatory condition that gave rise to this lawsuit in the first place.

As the District Court specifically found, "In 1976, the union launched a plan to pressure older licensed deck officers to retire." (B-10).

The District Court also found that Amendment 47, which embodied this scheme sponsored by the union, "was intended to prevent older officers from escaping this Hobson's choice by taking non-M.M.&P. jobs." (B-11).

The employers agreed to go along with this scheme to limit the employment opportunities available to older workers for reasons of their own, as the District Court found. (B-11).

The effect of the six-month withdrawal from employment condition imposed by the District Court upon the ability of Captain Chambless to receive his full pension benefit is to countenance an aspect of what was found to be illegal.

As the District Court said, "The union cannot adopt a policy of forcing applicants to retire or face low paying assignments if they refuse to do so and yet prohibit or penalize them from working apart from MM&P jobs matching the skills and experience they have acquired." (B-10) Yet this is precisely the consequence of the six-month condition imposed by that same Court upon the ability of Captain Chambless to receive his pension benefit.

. A full remedy for the intentional blocking of employment opportunities available to older licensed deck officers would be (a) to eliminate the six-month conditon and (b) to hold pursuant to Section 502(a)(3)(B) of ERISA (29 U.S.C. § 1132), that when they are forced to seek competitive work because of circumstances amounting to a constructive discharge, the equitable rule followed in *Post v. Merrill Lynch*, 48 N.Y.2d 84 (1979), quoted *supra*, at pp. 9-10, is applicable.

Neither employers nor unions with power over employment should be permitted to use offensively an anti-competitive device coupled with forfeiture of pension benefits to cripple economically a former employee and simultaneously deny other potential employers his services. *A fortiori*, a coalition of employers and a union acting in restraint of trade should not be able to accomplish the same result when the declared

purpose is to deprive older workers of opportunities contrary to the purpose of the age discrimination laws.

In *Folz v. Marriott Corp.*, 594 F. Supp. 1007, 1019 (W.D. Mo. 1984), the court concluded, after reviewing the statutory provisions of ERISA and their legislative history, that the courts are given a panoply of equitable powers in order to provide appropriate relief to remedy violations. Such relief, in addition to back pay, reinstatement or front pay, may include "forfeited employee benefits." (*Ibid.*)

It is submitted that the appropriate remedy in this case is payment of the full pension benefit without any diminution in economic value because of other employment of Captain Chambless, or because of the passage of time required to litigate his rights.

At issue is abusive behavior by defendants in violation of Section 510 of ERISA, 29 U.S.C. § 1140 condemned by the courts below. That provision makes it unlawful to "*discriminate* against a participant . . . for the purpose of *interfering with the attainment* of any right to which such participant *may* become entitled . . . (emphasis added), and specifically makes available for that purpose the equitable remedies provided under Section 502, 29 U.S.C. § 1132.

A full pension benefit without reduction under the M.M.&P. Pension Plan is certainly something to which Captain Chambless "may become entitled." Further, the findings of the District Court establish both that his achievement of that right was interfered with, and that he was discriminated against, by the defendants in this litigation.

In addition to the decision in *Folz v. Marriott Corp.*, *supra*, courts in other Circuits have given effect to a cause of action under Section 510 for discrimination and interference. See *Ursic v. Bethlehem Mines*, 556 F. Supp. 571 (D.C. Pa. 1983), aff'd, 719 F.2d 670 (3d Cir. 1983), and *Kross v. Western Electric Co., Inc.*, 534 F. Supp. 251 (N.D. Ill. 1982), aff'd in part, reversed in part, 701 F.2d 1238 (7th Cir. 1983).

As noted above under Point I, the availability of such a remedy in a constructive discharge situation has been upheld by the Ninth Circuit in *Lojek v. Thomas*, 716 F.2d 675, 680 (9th Cir. 1983).

The limited nature of the relief granted to the plaintiffs in this case therefore warrants consideration by the Court of the guidelines that should be followed in fashioning remedies in cases of blatant discrim-

ination and interference with the attainment of rights ERISA affords pension plan participants.

IV. REVIEW SHOULD BE GRANTED TO AVOID RELIANCE UPON ERISA TO PERMIT THE IMPAIRMENT OF EXISTING CONTRACT RIGHTS.

On the cross-appeal, the Court of Appeals rejected the contention that Captain Chambless was entittled to his full pension without regard to age on the ground that in 1975 the pension plan adopted an amendment making age 65 the normal retirement age. (A-17) However, there is no such requirement in the plan for the pension to which Captain Chambless is entitled.

This misunderstanding was perpetrated by the pension plan notwithstanding the contrary testimony of its own administrator, Stephen P. Maher. Maher unequivocally admitted at the trial that age 65 has no application as a retirement age for Captain Chambless or to the type of pension to which he is entitled (Tr. 76-77):

"THE COURT: When was the 65 age [requirement] effected?

THE WITNESS: The deletion of it, your Honor?

THE COURT: No. No. It was deleted and it has been reinstated, has it not?

THE WITNESS: Not for this pension requirement. Not for pension requirements, your Honor.

. THE COURT: There is no requirement now at age 65?

THE WITNESS: Not for the regular pension.

THE COURT: I am sorry. I am sorry. All right. I misunderstood. At the present time there is no requirement for regular pension?

THE WITNESS: No age requirement, right.

THE COURT: No age requirement.

THE WITNESS: No age requirement. Just twenty years of service pension credit.

THE COURT: All right."

ERISA is often carelessly read in terms of an age 65 normal retirement age. However, what the Act in fact says specifically is that "normal retirement age" is the "earlier" of when a participant "attains normal retirement age under a plan" *or* age 65. (29 U.S.C. § 1002(24).)

As shown by the Maher testimony quoted above, which of course was given *after* the amendment referred to by the Court of Appeals had been adopted, "normal retirement age" under the M.M.&P. Plan is based upon 20 years of credited service for pension credit under the plan. Since Captain Chambless had earned more than 32 years of credits before he made his pension application, he had in fact attained "normal retirement age" under the Plan in conformity to ERISA's requirement that the "earlier" point be used.

This conclusion is buttressed by ERISA's definition of "normal retirement benefit" (29 U.S.C. § 1002(22)): It is ". . .the *greater* of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement . . . ." (Emphasis added.) See also *Nichols v. Board of Trustees of the Asbestos Workers Local 24 Pension Plan*, 1 E.B.C. (BNA) 1868 (D.D.C. 1979).

As of May 1, 1977, after more than 30 years of credited service, Captain Chambless had reached the maximum level of pension benefit available to him under the M.M.&P. Pension Plan. As shown above, such entitlement was not dependent upon attainment of any specified age. Thus, under the pension plan, he was fully qualified to be considered as having both attained "normal retirement age" and qualified for the "normal retirement benefit."

The regulations promulgated under ERISA by government agencies are consistent with the foregoing interpretation. In language squarely applicable here, Treas. Regs. § 1.411(b) states: "For purposes of subdivision (i) of this subparagraph, *if an age is not specified by a plan as the normal retirement age*, then the normal retirement age under the plan is *the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service*." (Emphasis added.)

The foregoing definitions support the claim of Captain Chambless that, in order to satisfy the ERISA guarantee of non-forfeitability, actuarial adjustments to reflect his different life expectancy must be made

to insure that the value of the pension he receives today is no less than the value of what he would have received as of May 1, 1977.

The Preamble to the Regulations of the Department of Labor emphasizes that when benefits are suspended, the affected employee's benefit must be actuarially recalculated in order to compensate for benefit payments which were withheld. 2 PRENTICE-HALL, PENSION AND PROFIT-SHARING ¶ 90,332 at p. 90,763.

This result is mandated here particularly since, unlike the cases relied upon in the opinion of the Court of Appeals, the actual elimination of an age 65 requirement indisputably was the product of the bargaining history of the parties involved in this case, as the Maher testimony shows.

Attacked as "an unpardonable hardship" as early as 1961 by the president of the union was a pre-existing age 65 requirement. (H-4) Its elimination three years later as a result of collective bargaining, in return for a downward adjustment in wages to pay the cost, was heralded as a "major breakthrough". (H-3)

This contractual situation was not changed at any time prior to the adoption of pension plan Amendment 42 relied upon by the Court of Appeals (A-17), and Amendment 42 was not the outgrowth of any further bargaining development. It therefore could have no effect on the entitlement of Captain Chambless to a regular pension, and Mr. Maher admitted in his testimony that it did not.

In *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 fn. 14 (1971), this Court stated:

> "Under the established contract principles, vested retirement rights may not be altered without the pensioner's consent. See generally Note, 70 Col.L.Rev. 909, 916-920 (1970). The retiree, moreover, would have a federal remedy under § 301 of the Labor Management Relations Act for breach of contract if his benefits were unilaterally changed. See *Smith v. Evening News Assn.*, 371 U.S. 195, 200-201 (1962); *Lewis v. Benefit Coal Corp.*, 361 U.S. 459, 470 (1960)."

The foregoing statement was quoted with approval in *UMW v. Robinson*, 455 U.S. 562, 575 fn. 14 (1982).

What the bargaining history shows, therefore, is that Captain Chambless in effect paid for the elimination of the age 65 rule by a cut in pay. The enactment of ERISA can not properly be considered to be a basis for the elimination of a retirement benefit already enjoyed. See *Duchow v. New York State Teamsters Conference Pension and Retirement Fund*, 691 F.2d 74, 78 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 1902 (1983). The decision below is predicated upon the opposite assumption, and the importance of the issue provides a further reason for its review.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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